

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

77-1230

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

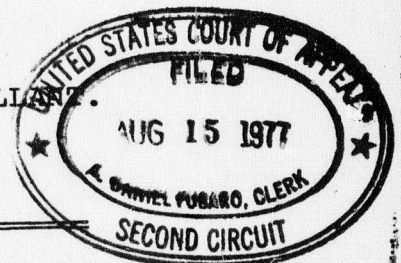
B
P/s

DOCKET NO. 77-1230

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

VICTOR W. SYMS,
DEFENDANT-APPELLANT.



ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Reply
BRIEF OF
APPELLANT VICTOR W. SYMS

RICHARD S. CRAMER
ASSISTANT FEDERAL PUBLIC DEFENDER
450 MAIN STREET
HARTFORD, CONNECTICUT 06103
ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

	<u>Page</u>
I. THE POLICE DID NOT HAVE PROBABLE CAUSE ON DECEMBER 25, 1976, TO BELIEVE THAT THE DEFENDANT WAS IN THE WALTON APARTMENT AT 132 HAMPTON STREET, HARTFORD	1
II. A GUEST CANNOT CONSENT TO A SEARCH OF HIS HOST'S APARTMENT	5

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Brown v. Illinois</u> , 422 U.S. 590 (1975)	6
<u>Dorman v. United States</u> , 435 F.2d 385 (D.C. Cir. 1970)	2
<u>Draper v. United States</u> , 358 U.S. 307 (1959)	3
<u>Fisher v. Volz</u> , 497 F.2d 333 (3d Cir. 1974).	1
<u>Langford v. Gelston</u> , 364 F.2d 197 (4th Cir. 1966)	1
<u>Norton v. Turner</u> , 427 F. Supp. 138 (E.D. Va. 1977)	4
<u>Pasterchik v. United States</u> , 400 F.2d 696 (9th Cir.), cert. denied, 395 U.S. 982 (1968)	5
<u>Stoner v. California</u> , 376 U.S. 483 (1964)	6
<u>United States v. Blair</u> , 366 F. Supp. 1036 (S.D.N.Y. 1973)	2
<u>United States v. Brown</u> , 467 F.2d 419 (D.C. Cir. 1972) . .	2,4
<u>United States v. Matlock</u> , 415 U.S. 164 (1973)	5
<u>United States v. McKinney</u> , 379 F.2d 259 (6th Cir. 1967)	2,4
<u>United States v. Phillips</u> , 497 F.2d 1131 (9th Cir. 1974)	1
<u>United States v. Stone</u> , 471 F.2d 170 (7th Cir. 1972) . . .	5

I. THE POLICE DID NOT HAVE PROBABLE CAUSE ON DECEMBER 25, 1976, TO BELIEVE THAT THE DEFENDANT WAS IN THE WALTON APARTMENT AT 132 HAMPTON STREET, HARTFORD.

The Government in its brief appears to concede the necessity for probable cause to search the home of a third party for a suspect for whom the police have an arrest warrant. The question to be resolved by this Court is whether or not Officer Campbell and his cohorts had reasonable grounds to believe that Victor Syms was in the 132 Hampton Street apartment when they made their entrance. An arrest warrant alone is not sufficient. Lankford v. Gelston, 364 F.2d 197 206 (4th Cir. 1966); United States v. Phillips, 497 F.2d 1131, 1136 (9th Cir. 1974); Fisher v. Volz, 497 F.2d 333, 340-342 (3d Cir. 1974).

A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in some stranger's home. Fisher v. Volz, supra at 341.

Despite the obfuscating language in appellee's brief (Brief for appellee at 10-11), no amount of exigent circumstances can dispense with the requirement of probable cause. United States

v. Blair, 366 F. Supp. 1036, 1040 (S.D.N.Y. 1973); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc).

Appellee is correct in maintaining that other circuits have permitted the search of third party homes without a warrant but with probable cause to believe the suspect was within the premises. It is incorrect, however, to assert that the level of probability of the existence of the suspect in the home in those cases was as low as it was in the instant case. In United States v. McKinney, 379 F.2d 259 (6th Cir. 1967), the police have (1) the statement of an accomplice that the defendant is in the premises of a girl friend which the accomplice has just exited, (2) statements of two other accomplices that the defendant spent a lot of time at his girl friend's apartment, and (3) a tip from an "unspecified informer" [as distinguished from the anonymous informer in the present case] that defendant was in the apartment. United States v. McKinney, supra at 264. Even on these facts, the Sixth Circuit considered the issue of probable cause to be a close question.

In United States v. Brown, 467 F.2d 419 (D.C. Cir. 1972), the police knew (1) Brown's girl friend and knew the apartment she lived in, (2) the building superintendent told the FBI he had seen a man resembling Brown in the apartment, and (3) there was a prolonged delay and refusal of Brown's girl friend to open the door when the police announced that they had a warrant for Brown's arrest. Significantly, the Brown

court still did not find probable cause to search the apartment until the girl friend refused to deny Brown's presence. United States v. Brown, supra at 423.

In contrast to the above cases and others cited in the defendant's main brief, the police essentially had no more than an anonymous phone call stating that Syms was in an apartment at 134 Hampton Street (Tr. 4). When this proved to be inaccurate information, the police received a second call from the same anonymous tipster that Syms and his girl friend were at 132 Hampton Street (Tr. 7). Not only does this tip, like any other anonymous call, not support probable cause, but the tipster's track record of misinformation should hardly require further police investigation. The police themselves recognized this when Officer Campbell admitted that he did not believe Syms was in the 132 Hampton Street apartment at that point (Tr. 48).

In order to support a finding of probable cause, therefore, some corroborating information must have come to police attention subsequent to the second anonymous tip but prior to their entry into the apartment. Draper v. United States, 358 U.S. 307 (1959). While corroboration of even innocent aspects of an informer's tip may justify a finding of probable cause, the present case presents almost no tip to corroborate and virtually no corroboration. All the police had been informed was the (1) Syms and (2) "his lady" (Tr. 4)

were at 132 Epton Street, and (3) were about to leave. Upon arrival at the apartment, the police were confronted by Donald Sheets, who could corroborate only that Cassandra, Syms' girl friend, was in a bedroom (Tr. 10). Sheets, a temporary occupant, implicitly contradicted the anonymous informer by stating he did not know if Syms was there. Since Sheets was neither the owner or lessee of these premises, there could be nothing unusual about him not knowing if Syms was there. Instead of asking the lessee of the apartment if Syms was there prior to entering the room, the police chose to enter first with their guns drawn (Tr. 10-11). Hence, there was not a single corroborating item to either believe (1) that Cassandra or anyone else was about to leave or (2) that Syms was in the apartment. It should be further stressed that this was not Syms' girl friend's apartment, cf. United States v. McKinney, supra; United States v. Brown, supra; Norton v. Turner, 427 F. Supp. 138 (E.D. Va. 1977), but his girl friend's mother's apartment. Since there was no evidence that Cassandra Robinson stayed there other than on a sporadic basis, or that Syms had ever stayed there, the police had even less reason to believe Syms was with his girl friend.

While Mrs. Walton had mentioned to Campbell on a previous occasion that the defendant had left town with her daughter (Tr. 61), it is not clear when this departure occurred. Ms. Robinson and the defendant might have left town months before the robbery and separated shortly thereafter.

II. A GUEST CANNOT CONSENT TO A
SEARCH OF HIS HOST'S APARTMENT.

Not only was Sheets a guest in the 132 Hampton Street apartment, but Officer Campbell was aware that he was merely "the boy friend of Cassandra's mother" (Tr. 10, 61) and did not know his name (Tr. 53).

The Supreme Court decision of United States v. Matlock, 415 U.S. 164 (1973), is inopposite for the proposition argued for by the Government. In that case, a lessee allowed police into a home in which she lived. If two people cohabit, each one takes the risk that the other may exercise their common authority to allow in third parties, such as police officers. United States v. Matlock, supra at 171, n.7. Sheets was neither a co-habitee nor a lessee, and there is no claim by Campbell that he erroneously believed Sheets had the authority to allow third persons into Mrs. Walton's apartment. A mere friendly relationship with an owner of a home or a car does not normally bestow upon the friend authority to allow police to invade the other's privacy. Pasterchik v. United States, 400 F.2d 696, 699 (9th Cir.), cert. denied, 395 U.S. 982 (1968). See also United States v. Stone, 471 F.2d 170, 177 (7th Cir. 1972) (Swigert, J. dissenting).

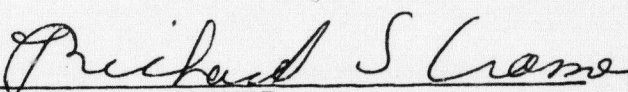
The fact Syms had "no greater interest in the apartment than Donald Sheets . . ." (appellant's brief at 15) is inconsequential and irrelevant. The defendant's "interest" in the

apartment only goes to establish his standing to exclude evidence gained by illegal police conduct. Sheets' "interest" or lack thereof is determinative of his authority to consent to a search. Stoner v. California, 376 U.S. 483 (1964).

There was no probable cause to justify the police intrusion into the apartment of Murial Walton. Donald Sheets did not consent to a search of the apartment, and if he did, he lacked authority. For the foregoing reasons and those set forth in the defendant's main brief, the written and oral confessions of the defendant should be suppressed as "fruit of the poisonous tree." Brown v. Illinois, 422 U.S. 590 (1975).

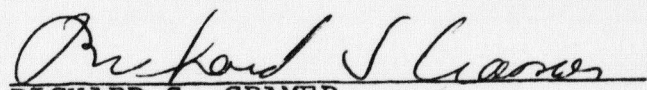
Respectfully submitted,

Dated: August 12, 1977


RICHARD S. CRAMER
Assistant Federal Public Defender
450 Main Street
Hartford, Connecticut 06103

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of Appellant Syms' Supplemental brief and appendix were hand-delivered to the office of George J. Kelly, Jr., Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut, this 12th day of August, 1977.


RICHARD S. CRAMER
Assistant Federal Public Defender